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# The Sentencing Memorandum: The Legal and Societal Implications of Its Online Publication

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# THE SENTENCING MEMORANDUM: THE LEGAL AND SOCIETAL IMPLICATIONS OF ITS ONLINE PUBLICATION

## INTRODUCTION

On March 23, 2015, a St. Louis City jury found defendant Terry Swopes guilty on four counts of unlawful possession of a firearm—felonies in the state of Missouri.[1] Less than two months later, the judge determined that Swopes was a persistent and prior offender under Missouri law.[2] Swopes was sentenced to thirteen years in prison.[3] This determination was aided by the information presented in the prosecutor's sentencing memorandum, which described Terry Swopes in the following manner: "With that type of history, the defendant should not be allowed back on the streets where he will do nothing but terrorize the St. Louis community. His history shows that he is extremely violent and has no control over his temper. The defendant is a danger to the public."[4]

Prior to his recent jail sentence, Swopes was previously incarcerated for almost twelve years.[5] Terry Swopes was born in 1980, and will be no older than forty-eight upon release.[6] By the time Swopes is released from prison, he will have spent close to half his life behind bars.

The City of St. Louis Circuit Attorney's Office detailed this information in a sentencing memorandum, which was submitted to the court for consideration

1. *See State v. Terry Tywon Swopes, No. 1422-CR02722-01*, MISSOURI CASE.NET, www.courts.mo.gov/casenet/base/welcome.do (follow "Case Number Search" hyperlink; then search "1422-CR02722-01" in the "Case Number" field; then follow "1422-CR02722-01" hyperlink, then follow "Charges, Judgments & Sentences" tab) [hereinafter Swopes, No. 142-CR02722-01].

2. *Swopes*, No. 1422-CR02722-01, *supra* note 1. Section 558.016 of the Revised Statutes of Missouri defines prior and persistent offenders as those persons guilty of two or more felonies committed at different times. MO. ANN. STAT. § 558.016. This status carries with it a recommended sentence one or two felony classes higher than the presently committed crime. *Id.*

3. *See Swopes*, No. 1422-CR02722-01, *supra* note 1.

4. *Memorandum in Support of State's Recommended Sentence of 15 Years in the Missouri Department of Corrections*, SCRIBD, 5, www.scribd.com/document/269535766/Terry-Swopes-Sentencing-Memo [hereinafter Sentencing Memo] (document on file with the Twenty-Second Judicial Circuit in the City of St. Louis, Missouri and subsequently uploaded to the foregoing platform for public viewing).

5. Sentencing Memo, *supra* note 4, at 4.

6. *See Swopes*, No. 1422-CR02722-01, *supra* note 1.

at sentencing.[7] The memorandum cited Swopes's character, criminal history, and the city's rise in gun violence as primary reasons for the imposition of a fifteen-year sentence.[8] Subsequently, it was published online.[9] This information, which presents the story of a convicted felon from the vantage point of the State, will follow Terry Swopes indefinitely.

Prosecutors are expected to advocate during sentencing.[10] Although obtaining a conviction is considered a "win," the prosecutor's primary responsibility is to seek justice, and "justice is not complete without the truth always being the primary goal in all criminal proceedings."[11] A prosecutor's role transcends traditional advocacy because a prosecutor does not represent individual interests or business entities—a prosecutor represents society as a whole.[12]

In that capacity, prosecutors weigh broad and varied interests, which highlights the importance of their role as society's mouthpiece during criminal sentencing. Amongst those broad and varied interests are three distinct groups. First, prosecutors represent the community from which the convicted person comes, including the concerned citizens who seek security and the damaged victims who seek restoration.[13] Second, through sentencing advocacy, prosecutors enable judges to "achieve the goals of sentencing" by offering "assurances of accuracy, fair play, and rationality."[14] Lastly, and perhaps most importantly, a prosecutor considers the criminal defendant's best interests.[15]

The sentencing process is related to the four general theories regarding punishment: retribution, deterrence, incapacitation, and rehabilitation.[16] Considering these theories in light of the defendant's interests, a prosecutor should "seek to assure that a fair and fully informed judgment is made and that

7. *See* Sentencing Memo, *supra* note 4.

8. *See* Sentencing Memo, *supra* note 4.

9. *See* Nicholas Phillips, *The Circuit Attorney's Sentencing Memos Are Going Online – Facebook Photos and All*, RIVERFRONT TIMES (June 24, 2015), http://www.riverfronttimes.com/newsblog/2015/06/24/the-circuit-attorneys-sentencing-memos-are-going-online-facebook-photos-and-all.

10. National District Attorneys Association, *National Prosecution Standards*, 79 http://www.moprosecutors.gov/Files/MAPA%20Docs/NDAA%20Prosecution%20Standard%203rd.pdf (last visited Dec. 28, 2016) [hereinafter *National Prosecution Standards*].

11. *National Prosecution Standards*, *supra* note 10, at 3.

12. *See National Prosecution Standards*, *supra* note 10, at 3.

13. Cait Clarke & James Neuhard, *"From Day One" – Problem-Solving Advocacy: Who's In Control As Client-Centered Sentencing Takes Center Stage?*, 1 THE SENTENCING PROJECT 74 (2003), http://69.89.27.130/CIW/CIWFromDayOne.pdf [hereinafter Clarke].

14. Clarke, *supra* note 13.

15. Clarke, *supra* note 13, at 2.

16. *Theories of Punishment*, FREE LEGAL ENCYCLOPEDIA, http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html (last visited Dec. 29, 2016).

. . . unfair sentence disparities are avoided."[17] The purpose of this thorough approach ensures that non-productive aspects of criminal sentencing are minimized and that constructive uses of available resources are maximized.[18] A secondary goal of prosecutorial sentencing advocacy enables the criminal defendant to seek "comprehensive and positive changes to lead him or her away from crime."[19] Though focusing on the interests of the criminal defendant may appear contrary to a prosecutor's crime-fighting function, the overall, long-term effect of this approach will benefit the interests of society at large by enabling ex-offenders to successfully reintegrate as productive, law-abiding citizens.

## THE EFFECTS OF SENTENCING MEMORANDA IN LIGHT OF PUNISHMENT THEORY

When a prosecutor publishes sentencing memoranda online, he or she exposes the criminal defendant to a type of punishment outside the confines of traditional sentencing.[20] While this practice may enable a prosecutor to address the immediate interests of the general public and judiciary, it fails to consider more elusive interests, specifically, those of both the criminal defendant and society, once a man like Terry Swopes is released from prison.

This practice, when viewed through the lens of punishment theory, promotes retribution: The "public's thirst for vengeance" is quenched by the imposition of a just sentence.[21] It accounts for deterrence: Publication of the sentencing memoranda "serves as an example to the rest of society, and it puts others on notice that criminal behavior will be punished."[22] It also accounts for incapacitation: The practice is designed to "physically prevent [the defendant] from committing another crime for a specific period."[23]

However, the practice of publishing sentencing memoranda online fails to account for, arguably, the most important function of criminal sentencing—rehabilitation.[24] The purpose of rehabilitation is clear—"prevent future crime by giving the offenders the ability to succeed within the confines of the law."[25] This purpose is thwarted by the publication of sentencing memoranda because

17. *National Prosecution Standards*, *supra* note 11.

18. Clarke, *supra* note 13, at 74.

19. Clarke, *supra* note 13, at 74.

20. *See generally* Phillips, *supra* note 9.

21. *Punishment*, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Punishment,+Criminal (last visited Sept. 29, 2016).

22. THE FREE DICTIONARY, *supra* note 21.

23. THE FREE DICTIONARY, *supra* note 21.

24. *See generally* James Gilligan, *Punishment Fails. Rehabilitation Works.*, N.Y. TIMES (Dec. 19, 2012, 11:43 AM), http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works.

25. THE FREE DICTIONARY, *supra* note 21.

the criminal defendant's interests yield to shortsighted punitive efforts. For example, this practice promotes the social stigmatization of ex-offenders and may impose severe employment barriers to the recently released criminal.[26]

Instead of continuing this practice, the legal and societal implications should be addressed. First, prosecutors and defense attorneys hotly contest the purpose of the publication of sentencing memoranda.[27] When this debate is considered in light of the modern trend in judicial sentencing, which promotes individualized sentences constructed within the framework of legislatively imposed guidelines, the online publication of these documents is unnecessary.[28] Next, legal considerations require weighing the public's right of access to this information against the criminal defendant's right to a fair trial and privacy interests. The societal concerns, including the practice's effect on rehabilitative efforts, should promote prosecutors to stop publishing sentencing memoranda on the Internet. By determining the proper scope of use associated with the sentencing memoranda in light of the preceding considerations, sentencing memoranda should be used as an advocacy tool, but the societal detriments caused by the online publication of these documents outweighs its goal of informing the public. The criminal justice system is not best served by a practice that indefinitely exposes an offender's criminal history to a society that must, inevitably, and perhaps begrudgingly, welcome the reintegration of those same defendants.

## THE DEBATE SURROUNDING THE SENTENCING MEMORANDUM

In Missouri, parties are expected to advocate during sentencing hearings.[29] Included in the parties' advocacy toolkit is the sentencing memorandum.[30] The sentencing memorandum goes beyond calculating criminal categories and following guided sentencing statutes by allowing the parties and judge to tailor sentences based upon highly relevant and individualized information.[31] Specifically, the tool enables the lawyers to summarize the legal, factual, and emotional reasons why the court should impose the requested sentence.[32] Whereas a defense attorney likely would focus on mitigating factors,

26. M. Kimberly MacLin & Vivian Herrera, *The Criminal Stereotype*, 8 N. AM. J. PSYCHOL. 197, 197–208 (2006) [hereinafter MacLin].

27. *See* Phillips, *supra* note 9.

28. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 538 (2007).

29. "At sentencing, all parties shall be permitted to present additional information bearing on the issue of the sentence." MO. REV. STAT. § 577.023(13) (2015).

30. *See* Jason Hawkins, "*The Art of the Sentencing Memorandum" a.k.a. "Strategies to Overcome Probation's Sentence"*, Winning Strategies Seminar, http://www.prisonology.com/files/2014/1519/6183/The_Art_of_the_Sentencing_Memorandum_by_Jason_Hawkins.pdf.

31. Hawkins, *supra* note 30.

32. Hawkins, *supra* note 30.

rehabilitation, or reduced culpability,[33] a prosecutor can focus on obtaining justice and informing the judiciary by presenting the facts of the case in light of the defendant's criminal history.[34]

For Terry Swopes, the prosecutor's sentencing memorandum detailed both objective information and personalized judgments pertaining to the State's recommended fifteen-year sentence.[35] After detailing Swopes' criminal history, the prosecutor summarized defendant's character:

> The defendant is a danger to the public. His history shows that he is extremely violent and has no control over his temper. With that type of history the defendant should not be allowed back on the streets where he will do nothing but terrorize the St. Louis community. . . . The defendant continues to show that he cannot follow laws and rules no matter where he is at.[36]

Through this memorandum, the prosecutor plays a significant role in the sentencing process.[37] The creation and submission of these documents is not contested, and are in fact supported by both prosecutors and defense attorneys.[38] However, prosecutors and criminal defense attorneys fiercely contest the purpose of the sentencing memorandum as it relates to the prosecutors' online publication of these documents.

The City of St. Louis Circuit Attorney's Office contends that the purpose of these documents is two-fold: First, the office argues that sentencing memoranda are prepared in response to judges asking for more information in order to tailor a proper sentence.[39] Second, the office believes that the publication of the documents helps inform the public about how the judicial system works, which leads to a boost in community cooperation and greater confidence in the criminal justice system.[40] Specifically, this argument is based upon the notion that the lay public does not understand the criminal justice system, especially when it comes to sentencing.[41] As Rachel Smith, chief prosecutor of the Community Partnership Bureau states, the more the public knows, the "more likely they are to cooperate, appear as jurors, and have confidence in the system."[42]

33. Hawkins, *supra* note 30.
34. *See* Sentencing Memo, *supra* note 4.
35. *See* Sentencing Memo, *supra* note 4.
36. Sentencing Memo, *supra* note 4, at 4.
37. LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 153 (7th ed. 2013).
38. *See* Hawkins, *supra* note 30.
39. Phillips, *supra* note 9.
40. Phillips, *supra* note 9.
41. Phillips, *supra* note 9.
42. Phillips, *supra* note 9.

This transparency argument appears generally supported by national data.[43] The National Center for State Courts conducts annual surveys to assess public opinion of state courts, and key findings of the survey indicate that the public is heavily concerned about the inefficiency and unfairness of the judicial system.[44] Specifically, findings show that African-Americans exhibit significantly less faith in the courts than the population as a whole.[45] Notably, the same number of people believe that court decisions are made based on an objective review of the facts and law as those who believe decisions are based on judges' personal beliefs and political pressure.[46] Additionally, as depicted in Table 1, when people were asked how they perceived different groups to be treated by the criminal justice system, an overwhelming majority believed that minority groups received unequal justice when compared to the wealthy and white populations.

| | Better | Same | Worse |
|---|---|---|---|
| The poor | 4 | 30 | 62 |
| African Americans | 4 | 39 | 51 |
| Divorced fathers | 5 | 40 | 46 |
| Hispanics | 5 | 43 | 44 |

43. David Kladney, a commissioner on the U.S. Commission on Civil Rights, contends that the public's trust in the criminal justice system has suffered debilitating losses in recent years and must be curtailed by those most heavily involved in the criminal justice system, including prosecutors. *See* David Kladney et al., *Face it, we've lost the public's trust*, CHI. TRIB. (Dec. 3, 2015), http://www.chicagotribune.com/news/opinion/commentary/ct-misconduct-police-prosecutors-justice-trust-perspec-1204-20151203-story.html.

44. *See* Memorandum from GBO Strategies on the Analysis of National Survey of Registered Voters to the Nat'l Ctr. for State Courts (Nov. 17, 2015), http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx.

45. *See* Memorandum from GBO Strategies to Nat'l Ctr. for State Courts, *supra* note 44.

46. *See* Memorandum from GBO Strategies to Nat'l Ctr. for State Courts, *supra* note 44.

| | | | |
|---|---|---|---|
| Single women | 14 | 50 | 28 |
| Small business owners | 9 | 55 | 28 |
| Elderly people | 12 | 55 | 27 |
| The middle class | 9 | 62 | 24 |
| | | | |
| The wealthy | 70 | 24 | 2 |
| Large corporations | 71 | 20 | 3 |

Table 1.[47]

This data suggests that the Circuit Attorney's Office's policy goal is valid. Prosecutors face a severe burden towards gaining the public's confidence, and the burden can be alleviated by a more transparent system that allows both judges and the public to be informed as to the particular facts surrounding a criminal defendant's imposed sentence.

On the other hand, the St. Louis Public Defender's Office has proposed an alternative motive behind the Circuit Attorney's Office's publication of sentencing memoranda.[48] Mary Fox, head of the City's Public Defender's Office, believes that the prosecutor's motive is less benign—to argue, outside the traditional setting of the courtroom, that judges' sentences are too lenient.[49] As Fox stated: "If they're not happy with the success of their sentencing arguments, they need to look to themselves, rather than complain about the decisions the judges are making."[50] Again, the offices' differences of opinion do not stem from the submission of the documents to the court, but rather from the online publication of the memoranda. Fox asserts a broad concern that material published in the sentencing memoranda has the potential to linger on the Internet.[51] The information may gain traction on the Internet and subject criminal defendants to undue and unjust public attention that could hinder the criminal defendant's ability to reintegrate with society upon release.

47. Memorandum from GBO Strategies to Nat'l Ctr. for State Courts, *supra* note 44.
48. Phillips, *supra* note 9.
49. Phillips, *supra* note 9.
50. Phillips, *supra* note 9.
51. Phillips, *supra* note 9.

The controversy centers on the publication of the sentencing memoranda and the legal and societal implications associated with the unfettered revelation of a criminal defendant's information. By discussing the evolution of American criminal sentencing policy, the implications associated with the publication of sentencing memoranda are made clear. Theories of punishment have changed over time, and a discussion of these developments can inform the discussion surrounding the publication of sentencing memoranda. Specifically, the publication of sentencing memoranda may support the theories of retribution and incapacitation while neglecting the criminal defendant's rehabilitation.

## THE EVOLUTION OF SENTENCING POLICY

### *A. Federal Sentencing*

In 1984, the U.S. Sentencing Commission was created by the Sentencing Reform Act Provisions of the Comprehensive Crime Control Act of 1984.[52] Congress prompted the Commission to address the previously "unfettered sentencing discretion" afforded to federal judges.[53]

Prior to the Commission, the preeminent punishment theory was *rehabilitation*.[54] During this period, a judge's role was "therapeutic"—"crime was a moral disease" and the judge was the "physician."[55] However, judges were not trained in how to exercise their significant discretion.[56] "It was as if judges were functioning as diagnosticians without authoritative tests, surgeons without *Gray's Anatomy*."[57] Additionally, because there was minimal, if any, appellate review of sentences, no common law of sentencing evolved.[58] One scholar described this period as "the unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory."[59]

To address this "unfettered sentencing discretion," the Commission was created to "establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and

52. U.S. Sentencing Comm'n, *An Overview of the United States Sentencing Commission* (Jan. 11, 2011), http://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf [hereinafter *Sentencing Commission*].

53. *Sentencing Commission*, *supra* note 52.

54. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695 (2010) [hereinafter *Short History*].

55. *Short History*, *supra* note 54.

56. *Short History*, *supra* note 54, at 696.

57. Gertner, *supra* note 28, at 528.

58. *Short History*, *supra* note 54, at 697.

59. *Short History*, *supra* note 54, at 697.

severity or punishment for offenders . . . ."[60] In carrying out its duties, the Commission promulgated the Federal Sentencing Guidelines. The self-enunciated purposes of the guidelines are clear: (1) To incorporate the theories of punishment—deterrence, incapacitation, and rehabilitation, and (2) "To provide certainty and fairness . . . by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors."[61] Overall, the administration of punishment required more certainty.

The resulting Sentencing Guidelines went into effect in 1987 and required federal judges to sentence defendants according to their "offense level," and "criminal history category."[62] After determining the offense level and criminal history category, a judge consults the Commission's sentencing table to determine a defendant's guideline range.[63]

Almost immediately, defendants began challenging the constitutionality of the Guidelines.[64] Constitutional challenges culminated in *U.S. v. Booker*, the case in which the Supreme Court held that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."[65] Additionally, the Court held that sentencing is subject to review by the courts of appeal for "unreasonableness." Since *Booker*, it appears that federal judges tend to follow the Guidelines, but also that the use of the Guidelines is less pronounced.[66] Sentencing disparities appear to be increasing, with different judges weighing certain factors—like the characteristics of the offense and the offender—differently from other judges with similar cases.[67] While sentences generally remain within the Guidelines, in the year following *Booker*, more than 8,100 defendants were sentenced to terms of imprisonment below the Guidelines, while approximately 1,000 received sentences higher than what the Guidelines

60. *Sentencing Commission*, *supra* note 52.

61. *Sentencing Commission*, *supra* note 52.

62. Specifically, judges determine the guideline range associated with the offense level, scored 1-43, depending on the circumstances of the crime, and the criminal history category, scored 1-6, depending on the defendant's past criminal conduct. *See* U.S. Sentencing Comm'n, *2015 Guidelines Manual* (Nov. 1, 2015), http://www.ussc.gov/guidelines-manual/2015/2015-chapter-1#1b11 [hereinafter *2015 Guidelines Manual*].

63. *2015 Guidelines Manual*, *supra* note 62.

64. *See* Mistretta v. U.S., 488 U.S. 361 (1989) (rejecting defendant's constitutional challenge on the basis of improper legislative delegation and violation of the separation of powers doctrine).

65. U.S. v. Booker, 543 U.S. 220, 264 (2005).

66. U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, 3 (2012), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf [hereinafter *Report on US v. Booker*].

67. *Report on US v. Booker*, *supra* note 66.

suggested.[68] To the chagrin of prosecutors, it appears that federal judges are more likely to depart downward from the Guidelines.

Unfortunately for the prosecution, the *Booker* decision also curtailed the prosecutor's ability to define the sentence[69] by empowering judges to find reasons why downward variances from the guidelines were appropriate.[70] Prior to the decision, there was concern in the judiciary that the Guidelines were too rigid and disabled the courts from addressing the particular facts and issues associated with individual defendants.[71] Under the mandatory Guidelines, judges recognized that the purposes of uniformity and proportionality embodied in the guidelines were often at odds.[72] Additionally, as Robert J. Conrad wrote, "An unfortunate by-product of the Guidelines system has been the diminution in passionate sentencing advocacy by defense and government attorneys."[73] However, while *Booker* and its progeny decreased the prosecutor's ability to "define the sentence," it did help solve Conrad's concern by opening the door to reinvigorated sentencing advocacy[74] by permitting judges "to consider every convicted person as an individual . . . as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[75]

### *B. Missouri Sentencing*

Missouri rejected the mandatory nature of the Federal Sentencing Guidelines. In 1994, the Missouri Sentencing Advisory Commission (MOSAC) was created, and was charged with developing advisory sentences and studying sentencing disparities between circuits and economic and social

68. U.S. Dept. of Justice, *Fact Sheet: The Impact of United States v. Booker on Federal Sentencing* (Mar. 15, 2006), http://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf.

69. Mandatory minimums enabled prosecutors to "dictate the sentence" by threatening harsher charges to coerce plea bargains. *See* Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?_r=0.

70. Judges may now base a below-Guidelines sentence in accordance with 18 U.S.C. § 3553(a) (1984) (amended 1986), which allows analysis of subjective factors like a defendant's health, employment history, and lack of prior criminal record. 18 U.S.C. § 3553(a).

71. Robert J. Conrad, Jr., *Regional Hearings on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, U.S. SENTENCING COMM'N, (Feb. 11, 2009), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090210-11/Judge%20Robert%20Conrad%20021109.pdf.

72. Conrad, *supra* note 71.

73. Conrad, *supra* note 71.

74. *See* Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 616 (2006).

75. Gall v. United States, 552 U.S. 38, 52 (2007).

classes.[76] Citing the rigidity imposed by the sentencing guidelines, Missouri opted for an information-based sentencing system.[77] Unlike the Federal Guidelines, MOSAC empowered all parties associated with sentencing to offer meaningful information in order to "recommend a uniform policy that will ensure certainty, consistency, and proportionality of punishment, recognize the impact of crime on victims, and provide protection for society. The use of these guidelines will result in minimal sentencing disparity and a rational use of correctional resources consistent with public safety."[78] As former Chief Justice of the Missouri Supreme Court and former Chair of the Missouri Sentencing Advisory Commission Michael Wolff stated, "The point is to get sentences that are not only 'just,' but effective in reducing future criminal behavior" by focusing on shared information and fully informed judicial discretion.[79]

The sentencing memorandum addresses Conrad and Wolff's concerns by enabling judges to become increasingly aware of the circumstances surrounding a particular defendant's crime. This end goal justifies the use of the sentencing memoranda as a source of judicial information

However, it does not appear that the online publication of sentencing memoranda promotes that purpose. Instead, the practice should be curtailed to avoid legal and societal issues that harm the punishment and reintegration process.

## THE LEGAL IMPLICATIONS OF PUBLISHING SENTENCING MEMORANDA ONLINE

As previously noted, the Circuit Attorney's Office's justification for publishing sentencing memoranda is two-fold: First, the need to bolster the public's confidence in the criminal justice system through transparency, and second, the desire to adequately inform judges, who must sentence criminal defendants.[80] In fact, based upon the public's confidence in the criminal justice system, these objectives seem well founded.[81] Nonetheless, the process of publishing sentencing memoranda carries with it the potential for other legal issues to arise. First, the criminal defendant's right to a fair trial comes into

76. *About Us*, MO. SENTENCING ADVISORY COMM'N., http://www.mosac.mo.gov/page.jsp?id=45464 (last visited Oct. 29, 2016).

77. The Commission believes that judicial discretion is the cornerstone of sentencing and that in order to have fair and effective sentencing, decision makers must have timely and accurate information about the offenders, the offenses, and the available options for sentencing. *About Us*, *supra* note 76.

78. *Purpose & Goals*, MO. SENTENCING ADVISORY COMM'N., http://www.mosac.mo.gov/page.jsp?id=45401 (last visited Oct. 29, 2016).

79. Michael Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 97 (2006).

80. Phillips, *supra* note 9.

81. Phillips, *supra* note 9.

conflict with the public's First Amendment Right of Access to court records. Next, the publication of sentencing memoranda may implicate the criminal defendant's privacy and confidentiality interests. Considering these two questions helps tailor the conversation regarding the publication of sentencing memoranda.

### *A. The Criminal Defendant's Right to a Fair Trial*

While the public maintains a qualified First Amendment right of access, the online publication of sentencing memoranda is linked to the criminal defendant's right to a fair trial, and it must be determined whether that right is infringed upon by the negative publicity associated with the sentencing memorandum.

Both Federal and Missouri law recognize a First Amendment right of public access to court proceedings and records.[82] In *Press-Enterprise Company v. Superior Count of California for Riverside County*, the Supreme Court considered whether the public's right of access extended to preliminary criminal hearings.[83] The Court recognized that the criminal defendant's right to a fair trial is not necessarily inconsistent with the public's right of access, rather "one of the important means of assuring a fair trial is that the process be open to neutral observers."[84] Similarly, in *Pulitzer Publishing Company v. Transit Casualty Company*, the Missouri Supreme Court held that the public has a right to inspect publicly filed records even if there is no legal interest at stake. The *Pulitzer* court echoed the Supreme Court's clear policy goal: "Justice is best served when it is done within full view of those to whom the court is ultimately responsible—the public."[85] However, both courts recognized that the presumption of openness is not unlimited.

While the *Press-Enterprise* Court recognized that the "right to an open public trial is a shared right of the accused and the public," it makes clear that the public's access right may yield when the "party seeking to close the hearing advances an overriding interest that is likely to be prejudiced."[86] While the *Press-Enterprise* holding applied to preliminary hearings, it should be noted that the Court emphasized that the First Amendment question cannot be resolved solely on the label of the event.[87] Instead, the Court focuses on two baseline inquiries: Whether the event was historically open to the public, and if

82. Press-Enterprise Co. v. Superior Court of Cal. for Riverside Ctny., 478 U.S. 1, 2 (1986); Pulitzer Publ'g Co. v. Transit Casualty Co., 43 S.W.3d 293, 300 (Mo. banc 2001).

83. *Press-Enterprise*, 478 U.S. at 2.

84. *Id.* at 7.

85. *Pulitzer*, 43 S.W.3d at 301.

86. *Press-Enterprise*, 478 U.S. at 7.

87. *Id.*

so, whether the public access plays a positive role in the functioning of that event.[88]

First, sentencing hearings have been traditionally open to the public.[89] Second, this tradition is necessary because public access places a check on the judicial system.[90] As stated by Justice William Brennan, "Public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"[91] The public has a massive interest in the criminal justice process, and that interest extends through the sentencing process.[92] However, the Court has made clear that the presumption of open court proceedings is merely a qualified right, and that there are some circumstances when a court must determine whether the rights of the accused might be undermined by publicity.[93]

The First Amendment right is not absolute.[94] In cases like *Press-Enterprise*, the court must consider whether the situation is "such that the rights of the accused override the qualified First Amendment right of access.[95] The applicable test is clear: "The presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[96] The preservation of "higher values" provides the court with broad discretion to consider not only the a legal balancing test between the public access right and the defendant's right to a fair trial, but also factors which implicate the broader interests of the judiciary, the defendant, and the public. By analyzing this test in the context of a sentencing memorandum, it is unlikely that criminal defendant can successfully argue that the sealing of a sentencing memorandum is necessary to protect his or her right to a fair trial.

Notably, *Press-Enterprise* and *Pulitzer* involved situations materially different from the questions posed by the nature of the sentencing memoranda.[97] Instead, the sentencing memorandum is a document that is

88. *Id.*

89. The federal policy with regard to open judicial proceedings is codified at 28 C.F.R § 50.9. The regulation states that "[b]ecause of the vital interest in open judicial proceedings . . . [t]hese guidelines apply to . . . sentencing proceedings . . . ."

90. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980).

91. *Id.*

92. *See* 28 C.F.R § 50.9.

93. Press-Enterprise Co. v. Superior Court of Cal. for Riverside Ctny., 478 U.S. 1, 7 (1986).

94. *Id.*

95. *Id.* at 9.

96. *Id.* (quoting *Press-Enterprise*, 464 U.S. at 510).

97. In *Press-Enterprise*, the news media sought access to transcripts of a preliminary hearing in a criminal prosecution, *see Press-Enterprise*, 464 U.S. 1, while in *Pulitzer* the petitioner sought access to sealed court records relating to the compensation and bonuses paid to the defendant in a civil case. *See* Pulitzer Publ'g Co. v. Transit Casualty Co., 43 S.W.3d 293, 300 (Mo. banc 2001).

presented to the court at the sentencing hearing, after the jury trial has concluded, which means that it becomes a part of the record after the imposition of sentence, when a judgment becomes final.[98] However, as detailed above, those cases provide the proper analytical framework to address the issue.

First, to override the qualified right of public access, the court should make specific findings detailing why the sealing is necessary and why less restrictive means are not appropriate.[99] The findings must be specific enough, such that a higher court can determine whether the decision was proper.[100] Also, the findings must contain detailed and definite threats to the moving party, in this case the criminal defendant.[101] In fact, "vague threats" asserted by the criminal defendant do not justify closing the record.[102] As stated in *Press-Enterprise*, "the First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]."[103]

It is unlikely that the criminal defendant's right to a fair trial supports the sealing of sentencing memoranda because juries rarely play a role in criminal sentencing.[104] However, the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have held that the First Amendment public access right extends to the various documents filed in connection with sentencing hearings.[105] Under the *Press-Enterprise* examination, these courts have held that because sentencing hearings are traditionally conducted in an open fashion, unrestricted access furthers the public interest by curbing judicial misconduct and promoting an understanding of the criminal justice system.[106] It appears that this rationale echoes that of the Circuit Attorney's Office.[107]

In *Kansas City Star Company v. Primm*, the court held that the defendant's right to a fair trial by impartial jurors trumped the public's First Amendment access right.[108] In that case, a newspaper company sought access to an affidavit attached to the initial complaint because it contained statements made by the

98. *See* State v. Welch, 865 S.W.2d 434 (Mo. Ct. App. 1993).

99. Kansas City Star Co. v. Primm, 143 F.R.D. 223, 226 (W.D. Mo. 1992).

100. *Id.*

101. *Pulitzer*, 43 S.W.3d at 302.

102. *Id.*

103. Press-Enterprise Co. v. Superior Court of Cal. for Riverside Ctny., 478 U.S. 1, 15 (1986).

104. As the trial portion of the process has concluded, the jury will not be influenced by the presentation of a sentencing memorandum.

105. U.S. v. Thompson, 713 F.3d 388, 393-94 (8th Cir. 2013).

106. *Id.*

107. *See* Phillips, *supra* note 9.

108. Kansas City Star Co. v. Primm, 143 F.R.D. 223, 226 (W.D. Mo. 1992).

defendant at the time of the alleged crime.[109] The court decided that sealing the affidavit was necessary because the information contained within the attached document focused on the accused.[110] Therefore, the court saw that it was possible the publication of the defendant's statements would pollute the jury pool, thereby infringing on the defendant's Sixth Amendment right to a fair trial.[111] Likewise, in *Gannet Co., Inc. v. DePasquale*, the Supreme Court noted the potential for documents associated with pretrial hearings to influence public opinion against the defendant. Closure of the proceedings was necessary to "insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun."[112] However, in *Press-Enterprise*, the Supreme Court distanced itself from this rationale.[113] Specifically, the court noted that through *voir dire*, "a court can identify jurors whose prior knowledge of the case would disable them from rendering an impartial verdict."[114]

Under the *Press-Enterprise* analysis, it is unlikely that a criminal defendant could successfully argue that his or her right to a fair trial is implicated by the publication of a sentencing memorandum.[115] Specifically, because much of the information contained in the sentencing memorandum was disclosed during the trial, the defendant should not fear public bias for sentencing purposes.[116] Though it may be contended that the online publication of the document has the potential to bias curious jurors who may see the criminal defendant in future cases, it is likely that this threat is too attenuated to warrant the sealing of a sentencing memorandum prepared for a different proceeding.[117] Instead, the criminal defendant should look to a different right he possesses—his right to privacy.

109. *Id.* at 224–25.

110. *Id.* at 227.

111. *Id.*

112. Gannet Co, Inc. v. DePasquale, 443 U.S. 368, 379 (1979).

113. *See* Press-Enterprise Co. v. Superior Court of Cal. for Riverside Ctny., 478 U.S. 1, 28 (1986).

114. *Id.* at 15.

115. "Once evidence has become known to the public . . . through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically present in the courtroom to see and hear the evidence . . . ." U.S. v. Webbe, 791 F.2d 103, 105 (8th Cir. 1981) (quoting In re Nat'l Broadcasting Co., 634 F.2d 945, 952 (2d Cir. 1980).

116. In *Primm*, the court permitted the defendant's statements contained in the affidavit to remain under seal until they were disclosed in a latter court proceeding, which indicates that the court protected the defendant's right to a fair trial in a narrowly tailored manner. 143 F.R.D. at 229.

117. As *Press-Enterprise* stated the risk of prejudicing the criminal defendant "does not automatically justify refusing public access . . . ." 478 U.S. at 15.

### *B. The Criminal Defendant's Privacy Interests*

For prosecutors, a primary goal associated with the sentencing process is informing the judiciary as to the legal and factual circumstances that warrant a specific imposition of sentence.[118] However, both the Federal and Missouri court systems rely on a different party to become informed for sentencing purposes—the probation office.[119] The documents prepared by these offices carry strict privacy measures that may implicate the publication of sentencing memoranda.[120] It is necessary to determine whether the characteristics of the documents prepared by probation officers contain such substantially similar information as sentencing memoranda as to warrant the sealing of the latter.

In the Federal system, the U.S. Probation Office is tasked with creating a pre-sentence investigation report.[121] Specifically, the Office must prepare information relating to the applicable Sentencing Guidelines and policy statements of the Sentencing Commission, calculate the defendant's offense level and criminal history category, state the resulting sentencing range and kinds of sentences available, and identify any factor relevant to the appropriate kind of sentence.[122] The factors typically considered include the defendant's history and characteristics, which may relate to any prior criminal records, the defendant's financial condition, and any circumstances affecting the defendant's behavior that might help impose a proper sentence.[123] The Probation Office's role is that of an independent investigator—to provide a detailed report in a "nonargumentative style."[124]

Similarly, the Missouri Department of Corrections' Board of Probation and Parole are charged with preparing Sentencing Assessment Reports, which aid the courts in determining an appropriate sentence for defendant's who have plead or been found guilty of a felony or misdemeanor.[125] The report must contain the defendant's prior criminal record and "such information about his characteristics, his financial condition, his social history, and the circumstances affecting his behavior."[126] The defendant has the right to inspect the report prior to its submission, and may object to perceived errors or deficiencies in the report.[127] Additionally, a court may give the defendant reasonable

118. Clarke, *supra* note 13.
119. *See* FED. R. CRIM. P. 32(a); *see also* MO. SUP. CT. R. 29.07.
120. *See* FED. R. CRIM. P. 32(a); *see also* MO. SUP. CT. R. 29.07
121. FED. R. CRIM. P. 32(a).
122. *Id.*
123. *Id.*
124. *See* FED. R. CRIM. P. 32(c).
125. *See* MO. SUP. CT. R. 29.07.
126. *Id.*
127. *See* MO. REV. STAT. § 557.026.2 (2006).

opportunity to rebut information contained in the report and may order a supplemental report.[128]

Noteworthy to the analysis of sentencing memoranda is the fact that federal pre-sentence investigation reports must be filed under seal.[129] Similarly, in Missouri, sentencing assessment reports are confidential documents filed under seal.[130] Additionally, Missouri courts have the discretion to make confidential any court document that would otherwise be presumed public.[131] Noting the extreme similarities between the contents of the sentencing memoranda and the probation offices' sentencing reports, courts should be compelled to consider why sentencing memoranda should not also be sealed.

The comparable information contained in sentencing memoranda and presentence reports is striking. Sentencing memoranda contain information about the defendant's criminal history, the facts of the present case, and opinions concerning the imposition of sentence.[132] Similarly, sentencing reports contain information relating to the defendant's prior criminal record and "such information about his characteristics, his financial condition, his social history, and the circumstances affecting his behavior."[133] In light of the striking similarities between the documents, sealing the prosecutor's sentencing memoranda is appropriate to serve the interests of the judiciary and the criminal defendant's privacy.

In fact, this focus on the criminal defendant's privacy has received judicial support. Recently, Judge Mark W. Bennett of the U.S. District Court for the Northern District of Iowa wrote an opinion chastising the prosecutor's decision to file information about a defendant's prior drug convictions, calling the prosecutor's actions "stunningly arbitrary."[134] In order to justify this reprimand, it is important to consider the policy surrounding the automatic sealing of presentence reports.

128. *Id.*

129. Such reports shall be part of the record but shall be sealed and opened only on order of the court. *See* National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963); *see also* FED. R. CRIM. P. 32(e)(3), which permits the court to direct the probation officer to not disclose the report to anyone other than the court.

130. MO. SUP. CT. R. 4.24(1)(k).

131. Pursuant to MO. SUP. CT. R. 4.25, a court may order that a document remain inaccessible from the general public for good cause shown. MO. SUP. CT. R. 4.25. It appears that the standard from *Primm* applies for the sealing of a document that would otherwise be presumed public.

132. *See* Phillips, *supra* note 9.

133. *See* Phillips, *supra* note 9. *See also* Sentencing Memo, *supra* note 4.

134. Stephanie Clifford, *From the Bench, a New Look at Punishment*, N.Y. TIMES (Aug. 26, 2015), http://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html?_r=0.

First, it is clear that presentence reports are not considered judicial documents to which the public has a right of access.[135] In *In re Siler*, the court held that the presentence reports are not covered by the public's First Amendment right of access because the documents are "handled and marked as confidential reports."[136] In stark contrast to other documents, courts lack discretion to release these documents.[137] Notably, the *Siler* court found that the *Press-Enterprise* test did not apply to these documents because of "the obvious difference between the ability to attend open court and post-trial access to confidential documents."[138] Instead, the defendant, the defendant's attorney, the prosecutor, and the court are the only parties to which the documents are to be released.[139] In *United States Department of Justice v. Julian*, the Supreme Court specifically addressed "the need to protect the confidential information contained in the report."[140] The Court recognized that the dissemination of information contained in the report could cause harm to the defendant.[141] In fact, the presentence report contains intimate information related to psychological data that outsiders might be interested in, but nevertheless barred from discovering because of the possibility that the publication of such information may injure the criminal defendant.[142]

The sensitive nature of the information contained in presentence reports is strikingly similar to the information detailed in a prosecutor's sentencing memoranda. Additionally, the two documents have the same ultimate purpose—enable the judge to render a fair opinion that takes into consideration the defendant's history, the facts of the crime, and public safety.[143] Therefore, like a presentence report, a sentencing memorandum should be filed under seal.

## PRACTICAL IMPLICATIONS AND THE SENTENCING MEMORANDA

Along with the potential legal issues revolving the online publication of sentencing memoranda, there are substantial issues regarding their publication as it relates to a criminal defendant's future *after* prison. First, a convicted

135. In re Siler, 571 F.3d 604, 610 (6th Cir. 2009).
136. *Id.*
137. *Id.*
138. *Id*. at 610, n. 2.
139. FED. R. CRIM. P. 32(e)(2).
140. U.S. Dept. of Justice v. Julian, 486 U.S. 1, 12 (1988).
141. *Id.* at 1.
142. William P. McLauchlan, *Privacy and the Presentence Report*, 54 IND. L.J. 347, 365 (1979).
143. Hawkins, *supra* note 30.

felon faces immense societal and existential stigma upon release.[144] Second, convicted felons are often presented with other societal hurdles, like finding employment.[145] Lastly, the online publication of sentencing memoranda may affect minority groups at disproportionately higher rates.[146] These hurdles alienate the felon from his or her community and increase rates of recidivism.[147] Therefore, by broadening the public's access to information related to a felon's past crimes, the publication of sentencing memoranda likely will degrade one of the crucial purposes of the initial punishment—the felon's rehabilitation. In other words, the question that remains is whether the indeterminate publication of sentencing memoranda does more harm than good after the criminal defendant is convicted and serves his or her time.

### *A. Societal Stigma Associated with the Sentencing Memorandum*

Among the multitude of barriers a convict faces upon release is the societal stigma associated with being a convicted felon.[148] This stigmatization is one of the largest obstacles to successful community reintegration.[149] Research tends to show that people think negatively of "criminals."[150] When asked to think of "criminals," people think about low socioeconomic status and minority races,[151] and associate negative personality traits with the word "criminal."[152] Though incarceration terminates, the released felon faces a new category of punishment—the societal stigma associated with being a convicted felon.

In the context of a sentencing memorandum, this societal stigmatization of convicted felons supports the conclusion that the promotional exposition of criminal information presented through an argumentative lens would increase the negative stigma—essentially, the more a person knows about a convicted felon's criminal history, the more he or she will stigmatize that person. This conclusion inhibits the successful release of a convicted felon by degrading the

144. Kelly Moore et al., *Jail Inmate's Perceived and Anticipated Stigma: Implications for Post-Release Functioning* (July 30, 2012), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4103667/.

145. *See* Cary Cooper, *You've Been Googled*, GUARDIAN (April 12, 2011), http://www.theguardian.com/careers/careers-blog/google-online-searches.

146. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOCIOLOGY 937, 960 (2003) (suggesting that the online publication of sentencing memoranda will contribute to the disproportionately lower rate of black employment).

147. Moore, *supra* note 144.

148. Moore, *supra* note 144.

149. Moore, *supra* note 144.

150. Moore, *supra* note 144.

151. Esther I. Madriz, *Images of Criminals: A Study on Women's Fear and Social Control*, 11 GENDER & SOC. 342, 342 (1997).

152. MacLin, *supra* note 26 at 197–99.

hope of successfully reintegrating with the same society that stigmatizes him or her.[153]

While a majority of research focuses on society's perceptions of criminals, the stigma felt by criminals themselves also substantiates the need to keep sentencing memoranda off the Internet. In fact, simply being aware of the fact that one is stigmatized is linked to unemployment, income loss, depression, poor social functioning, and negative coping skills.[154] Notably, there is also a link between perceived stigma and the lower likelihood of seeking treatment.[155] When considering the percentage of inmates suffering from a mental illness or drug addiction,[156] this perceived stigma could be catastrophic to rehabilitative efforts. As writer Alexander Persons stated, "We are locking up people suffering from mental illness and addiction, and then not treating them."[157] Through the lens of the prosecutor, the online publication of the sentencing memoranda may achieve the goal of informing the public,[158] but it likely leads to a harsh outcome for the convicted felon.

By reinforcing and promoting the social stigmatization of convicted felons, the publication of sentencing memoranda could lead offenders to feel more like outsiders, which can cause them to retreat from the community and engage in higher rates of criminal actions.[159] In fact, labeled felons do subsequently engage in more criminal activity than non-labeled felons.[160] Online sentencing memoranda go beyond labeling by promoting the public's preconceived notions towards convicted felons. At sentencing, the prosecutor's desire to advocate for a just sentence is well founded, but a memorandum that lingers online may cause unforeseen damage to the criminal justice system by contributing to recidivism.

153. Moore, *supra* note 144.

154. Moore, *supra* note 144.

155. Moore, *supra* note 144.

156. The Bureau of Justice statistics estimate that 1.2 million people with mental illnesses are imprisoned at the local, state, and federal level. Additionally, a study conducted by the National Center on Addiction and Substance Abuse estimates that 65% of the 2.3 million individuals incarcerated qualify as substance abusers or addicts. *See* Lauren E. Glaze, *Correctional Populations in the United States, 2010*, U.S. DEPT. OF JUSTICE 8 (Dec. 2011), http://www.bjs.gov/content/pub/pdf/cpus10.pdf.

157. Alexander Persons, *Treatment, Not Jail, For Addicts, Mentally Ill*, THE BALTIMORE SUN (Jan. 6, 2016, 10:37 AM), http://www.baltimoresun.com/news/opinion/oped/bs-ed-addicts-jail-20160106-story.html.

158. Phillips, *supra* note 9.

159. *See generally* Ted Chiricos et al., *The Labeling of Convicted Felons and its Consequences for Recidivism*, 45 CRIMINOLOGY 547 (2007).

160. Chiricos et al., *supra* note 159.

### *B. Online Publication Imposes Employment Barriers*

Given the availability of information related to criminal history contained in the public sentencing memoranda, it is likely that employers will contemplate this information in their hiring practices.[161] For employers, this information is relevant for several reasons. First, felony offenders are legally precluded from specific types of employment.[162] For example, in Missouri, persons with certain criminal convictions are precluded from obtaining work as teachers, bus drivers, mental health workers, or health care providers.[163] Second, employers value dependable and trustworthy employees, and an offender's criminal history may give a wary employer cause to refuse to hire an individual based on that record.[164] Specifically, for jobs that require constant customer contact or the handling of cash, employers may tend to consider the employment of an offender an unnecessary risk.[165]

While employers may value the information related to a potential employee, state and federal law limit his access and use of that information. In Missouri, employers are statutorily precluded from refusing to hire an individual based on a prior conviction unless that refusal is "reasonably related to the competency of the individual to exercise the denied right or privilege."[166] The policy goal is made clear in the comments to that statute: "By eliminating irrational barriers to employment, we assist offenders in reintegrating themselves into the community."[167] Additionally, cities are permitted to enact ordinances making it illegal to research an applicant's criminal history, through a employment application *or otherwise*, until the applicant has received a conditional offer of employment.[168] If an employer offers an ex-offender employment and subsequently researches his or her criminal history, they are bound by Missouri Statute § 561.016, and must refuse employment only if that refusal is reasonably related to the competency of the individual to perform the work.[169]

161. Harry J. Holzer et al., *Employment Barriers Facing Ex-Offenders*, URBAN INSTITUTE OF REENTRY 1, 4 n.6 (May 19-20, 2003), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410855-Employment-Barriers-Facing-Ex-Offenders.PDF.

162. Holzer, *supra* note 161, at 8.

163. *See* MO. REV. STAT. §§ 168.071, 168.133, 302.272.5, 630.170; 660.315, 660.317.

164. Holzer, *supra* note 161, at 8.

165. Holzer, *supra* note 161, at 8.

166. MO. ANN. STAT. § 561.016 (West 2015).

167. *Id.*

168. In Columbia, Missouri, local ordinance 12-90 precludes employers from conducting research related to an applicant's criminal history. COLUMBIA, MO., ORDINANCE NO. 22286 § 1 sec. 12-90 (2014).

169. MO. ANN. STAT. § 561.016 (West 2015).

Access to ex-offender information critically alters an employer's willingness to hire an individual.[170] In a survey conducted of over 600 employers, more than forty percent indicated that they would "probably" or "definitely" not consider hiring an ex-offender for a job that did not require a college degree.[171] In stark contrast, that same survey indicated that ninety percent of employers would "probably" or "definitely" consider disadvantaged applicants, like welfare recipients or workers with a GED but no high school diploma.[172] This data suggests that information regarding a criminal conviction plays a substantial role in employers' hiring practices. Thus, the wealth of information related to an ex-offender's criminal information contained in a public sentencing memorandum likely would dissuade employers from considering offender applicants.[173]

Approximately 97% of imprisoned felony offenders are eventually released from prison[174], and the vast majority of offenders receive a suspended imposition or execution of sentence, meaning that those offenders are not imprisoned.[175] For an offender with a suspended imposition of sentence who successfully completes the terms of his or her probation, his or her record will not "show" a conviction.[176] However, when searching for a job, the publicized nature of the sentencing memoranda may impose substantial barriers.[177] Difficulties posed by the sentencing memorandum could compound with other difficulties faced by ex-offenders. For example, studies suggest ex-offenders face other extreme obstacles to employment, including their low levels of education, substance abuse and mental health issues, race-related stereotyping, and their self-imposed predispositions towards distrust and alienation.[178] While informing the judge and the public is an important prosecutorial task, society is

170. Harry J. Holzer et al., *How Willing Are Employers to Hire Ex-Offenders?*, 23 FOCUS 40, 41 (2004), http://www.irp.wisc.edu/publications/focus/pdfs/foc232h.pdf [hereinafter *How Willing Are Employers to Hire Ex-Offenders?*].

171. *How Willing Are Employers to Hire Ex-Offenders?*, *supra* note 170, at 40-41.

172. *How Willing Are Employers to Hire Ex-Offenders?*, *supra* note 170.

173. Additionally, considering the biased viewpoint of a prosecutor's sentencing memorandum, the employer will only discover information related to the aggravating factors of the crime as opposed to the mitigating factors.

174. Persons, *supra* note 157.

175. Persons, *supra* note 157.

176. MO. REV. STAT. § 557.011 (2011).

177. It is common for employers to "google" search potential employees. A recent study indicated that 77% of employers perform google searches of recruited candidates. *See* Cary Cooper, *You've Been Googled*, GUARDIAN (April 12, 2011), http://www.theguardian.com/careers/careers-blog/google-online-searches.

178. Harry J. Holzer, et al., *Working Discussion Paper for the Urban Institute's Reentry Roundtable: Can Employers Play a More Positive Role in Prisoner Reentry?* URBAN INSTITUTE, 3 (2002), www.urban.org/uploadedPDF/410803_PositiveRole.pdf [hereinafter *Working Discussion Paper*].

better served when past criminals are able to proactively engage society upon release from prison or upon completion of probation.[179]

### *C. Sentencing Memoranda's Disparate Impact on Racial Minorities*

Federal law does not prohibit employers from asking applicants about their criminal history.[180] However, Title VII does prohibit employers from using policies or practices that screen individuals based on criminal history information if (1) they significantly disadvantage protected classes such as African Americans and Hispanics;[181] and (2) they do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.[182]

Data suggests that African-American men are the least likely job applicants to receive offers of employment.[183] Additionally, because job growth tends to occur in suburban areas, where substantially fewer black-applicants reside, African-Americans are less likely to gain employment directly as a result of new jobs hiring.[184] Minority and ex-offender status interact powerfully to preclude African-Americans with criminal records to gain employment.[185]

This "disparate impact theory" has oft been used by the Equal Employment Opportunity Commission ("EEOC") to challenge employers' hiring practices and procedures regarding criminal history checks. Most recently, in *EEOC v. Freeman*, the EEOC alleged that the defendant's criminal background checks, although facially neutral, had a disparate impact on African American and male applicants.[186] In that case, a unanimous panel for the U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment in favor of the employer.[187] Summary judgment was affirmed substantially due to the court's finding that the EEOC's expert witness's report contained "an alarming number of errors and analytical fallacies."[188] In fact, in a concurring opinion,

179. *Working Discussion Paper*, *supra* note 178, at 6-7.

180. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Pre-Employment Inquiries and Arrest Conviction*, http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm (last visited February 4, 2017).

181. For example, in *Griggs v. Duke Power Co.*, the Supreme Court held that Title VII prohibited an employer to require applicants to have a high school diploma because the condition of employment was unrelated to successful job performance and disqualified blacks at substantially higher rates than whites. *See* 401 U.S. 424 (1971).

182. This legal examination is known as the disparate impact theory.

183. Moore, *supra* note 144.

184. Holzer, *supra* note 161, at 7–8.

185. Black offenders receive less than one-seventh the number of offers received by their white counterparts with similar skills and experience.

186. Equal Employment Opportunity Comm'n v. Freeman, 778 F.3d 463 (4th Cir. 2015).

187. *Id.*

188. *Id.* at 466.

the court chastised the EEOC's "disappointing litigation conduct," namely that the EEOC's expert had been repeatedly rejected in the other circuits.[189] However, *Freeman* aptly summarizes the aggressive policy currently being pursued by the EEOC. In fact, the case highlights at least three of the six national priorities effectuated by the EEOC's Strategic Enforcement Plan for the fiscal years 2013-2016.[190] Specifically, the EEOC intends on targeting screening tools, like background checks, that, despite being facially neutral, disparately impact a protected class of individuals.[191] While the *Freeman* decision offers, on its face, some comfort to employers, the background noise suggests that the EEOC is vigorously attempting to challenge an employer's previously unfettered reliance on criminal history records when making hiring determinations. Although the summary judgment in *Freeman* in favor of the employer was based on an expert's incompetency, the court never actually considered the merits of the EEOC's claim.[192] The issue resulting is whether data suggests that members of protected classes that have a criminal record are less likely to gain employment than their white counterparts. If so, it is logical to presume that additional public information disseminated via sentencing memoranda would contribute to potentially discriminatory hiring procedures.

Data shows that African-American men face employment barriers at greater rates than their white counterparts.[193] Additionally, it is undisputed that African-American men are incarcerated at greater rates than white men.[194] Based on the total incarcerated population on June 30, 2011 and the U.S. resident population for July 1, 2010, roughly 8,008 per 100,000 African-American men between the ages of twenty to twenty-four were incarcerated.[195] In comparison, 1,269 per 100,000 white men were incarcerated. This trend is not dependent on age.[196] However, in order to establish the proposition that criminal history information, when considered by employers, discriminately impacts African-Americans, it is essential to consider whether employers care about race at all. Devah Pager, in an oft-cited study, concluded that race plays a substantial role in hiring decisions.[197] Specifically, Pager solicited callbacks

189. *Id.* at 468.

190. Specifically, the *Freeman* case demonstrates that the EEOC's Strategic Enforcement Plan prioritizes: (1) Eliminating Barriers in Recruitment and Hiring; (2) Addressing Emerging and Developing Issues; and (3) Preserving Access to the Legal System. *See Strategic Enforcement Plan FY 2013-2016*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (2013), http://www.eeoc.gov/eeoc/plan/upload/sep.pdf.

191. *Strategic Enforcement Plan*, *supra* note 190.

192. *Freeman*, 778 F.3d at 468 n.8.

193. *Correctional Populations*, *supra* note 156, at 8.

194. *Correctional Populations*, *supra* note 156, at 8.

195. *Correctional Populations*, *supra* note 156, at 8.

196. *Correctional Populations*, *supra* note 156, at 8.

197. Pager, *supra* note 146.

from employers and noted the effect of race and criminal history on employment opportunities.[198] Pager found that only fourteen percent of blacks without criminal records received callbacks, compared to thirty-four percent of whites without criminal records.[199] Even more striking was Pager's finding that whites with criminal records received callbacks at higher rates (17%) than blacks *without* criminal records (14%).[200] Most important for this portion of the article's proposition—that African-American men with criminal records will be disparately impacted by the publication of sentencing memoranda as compared to their white counterparts—is supported by Pager's study. Pager found that the presence of a criminal record was more pronounced for African-American men than white men.[201] Specifically, Pager noted that for whites, the ratio of callbacks for non-offenders relative to ex-offenders was 2:1, meaning that for every two white men without a criminal record called back, there was one white man with a criminal record called back. In stark contrast, the same ratio was 3:1 for African-American males.[202] Thus, the negative effect of a criminal record is forty percent larger for blacks than whites.[203] Table 2 displays Pager's findings in a reproduced graph format.

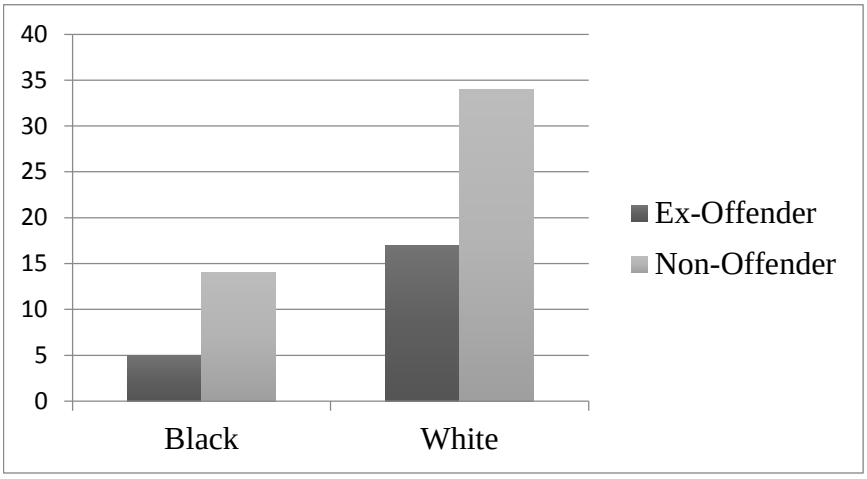


Table 2.[204]

Data suggests that African-American males will be negatively affected at overwhelmingly disproportionate rates by employers who consider a job applicant's criminal history. Because African-Americans are incarcerated at

198. Pager, *supra* note 146, at 958.
199. Pager, *supra* note 146, at 957.
200. Pager, *supra* note 146, at 958.
201. Pager, *supra* note 146, at 959.
202. Pager, *supra* note 146, at 959.
203. Pager, *supra* note 146, at 959.
204. Pager, *supra* note 146, at 959.

higher rates than white males[205] there is a greater likelihood that sentencing memoranda will be viewed and considered negatively towards African-American men by potential employers.

## CONCLUSION

Sentencing is a pivotal moment during the criminal justice process. Sentencing should not be arbitrary, and judges must take into account the particular facts of the case in crafting an appropriate sentence.[206] For that reason, prosecutors and defense attorneys alike use sentencing memoranda to inform the judiciary of the specific facts of the case and the particular criminal defendant's background, criminal history, and character.[207] While the use of the sentencing memoranda is not contested, the Circuit Attorney's decision to publish these documents online is.[208] By ensuring that the document reaches the judge, a prosecutor can be assured that the particular facts of a case will be considered in the sentence, which is consistent with the goals of the Circuit Attorney's Office.[209] However, the document should be sealed because of the confidential information it contains, along with the debilitating effects its release can have on the ex-offender, which likely would occur at disproportionately harmful rates towards minority groups. Additionally, sealing the document promotes the ex-offenders rehabilitation, which is a critical part of a prosecutor's responsibility.[210] By reconciling the theories of punishment associated with criminal sentencing, this tailored use of sentencing memoranda can accomplish the goals of punishment while encouraging the ex-offender's rehabilitation.

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205. *Correctional Populations*, *supra* note 156, at 8.
206. Gertner, *supra* note 28, at 538.
207. *See* Hawkins, *supra* note 30.
208. Phillips, *supra* note 9.
209. Phillips, *supra* note 9.
210. Clark, *supra* note 13.

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